2018 REVIEW

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This article reviews some key developments in the field of torts during 2018. As will be seen, a variety of interesting questions have arisen for decision. A number of the cases concern professional persons, and those that do not nonetheless raise issues relevant to the field of professional liability.

Liability for negligence

Nature of the damage

A duty of care is normally owed by a person who by negligence causes personal injury to another. A duty equally is likely to be owed to an owner where a person negligently causes physical damage to a building, or physical damage to or loss of personal property. However, in the case of mental injury the position in leading common law countries diverges, with a narrow approach to the duty question being taken in the UK and a broader approach, in line with that taken in physical injury cases, being taken in Australia and Canada. Further controversy tends to surround the question of recovery in negligence for financial loss, and here, both in the UK and elsewhere, various special controls apply.

If a duty is more easily established where damage is physical, then the correct classification of the damage is likely to be important. Determining whether there has been physical injury or harm to the person does not usually give rise to special difficulty, but questions as to the very nature of physical injury occasionally can arise. The decision of the Supreme Court in *Dryden v Johnson Matthey Plc*[1] provides an example. The claimants were employed by the defendants at chemical plants where they were negligently exposed to platinum salts and sensitised to a full blown platinum allergy. Persons who had been sensitised but had not yet developed symptoms were not limited in any way in their lives, except that they needed to avoid circumstances in which they were exposed to platinum salts. Platinum salts were not encountered in everyday life, only in certain specialised workplaces, and sensitised people could not work in jobs which involved the potential for further exposure. In these circumstances the Court of Appeal held that they could not claim in respect of personal injury where no allergy had developed and their condition was and would remain symptomless.[2] But the Supreme Court was satisfied that the claimants had in fact suffered actionable injury and that their claim should succeed.

Lady Black, giving a judgment with which the other justices agreed, noted that the parties were agreed that if a person were to develop a platinum salt allergy as a result of improper exposure to platinum salts at work, as opposed to mere sensitisation, he or she *would* have suffered personal injury of a type which would give rise to a cause of action in tort. What divided them was whether or not sensitisation on its own was actionable personal injury. The claimants relied upon *Cartledge v E Jopling*

[1] [2018] UKSC 18, [2018] 2 WLR 1109.

[2] *Greenway v Johnson Matthey Plc* [2016] EWCA Civ 408, [2016] 1 WLR 4487.

& Sons Ltd[3] as supporting their case that it was, and Johnson Matthey relied upon *Rothwell v Chemical and Insulating Co Ltd*[4] as supporting their case that it was not.

In *Cartledge* the claims were brought by steel dressers who had contracted pneumoconiosis whilst working in the defendant's factory, and the issue was whether their claims were statute-barred. The House of Lords held that a cause of action for injury by pneumoconiosis accrued when damage by scarring of the lung tissue from inhaling silica dust must have occurred, notwithstanding that the plaintiffs did not find out about the injury for a number of years. Their actions were commenced more than six years after the date of the unknown damage, and accordingly they were held to be barred. Lord Pearce affirmed that actionable harm could be suffered despite the fact that a man had no knowledge of the secret onset of pneumoconiosis and suffered no present inconvenience from it. The question was whether he had suffered material damage by any physical changes in his body, and this was a question of fact in each case.

In *Rothwell* the claimants were negligently exposed by their employers to asbestos dust, putting them at risk of developing one or more long-term asbestos related diseases. They had not in fact contracted such diseases, but their exposure had caused them to develop pleural plaques, viz localised areas of pleural thickening. These plaques had no adverse effect on any bodily function and did not themselves have the propensity to develop into an asbestos related disease, but the claimants argued that physical changes to the body coupled with the risk of future injury from exposure to asbestos and which caused consequent anxiety could found a claim for negligence. However, the House of Lords rejected their argument. Lord Hoffmann said the important point was that, save in the most exceptional case, the plaques would never cause any symptoms, did not increase the susceptibility of the claimants to other diseases and did not shorten their expectation of life. They had no effect on their health at all. So they were not damage. This being so, his Lordship asked whether they became damage when aggregated with the risk which they evidenced or the anxiety which that risk caused. Yet neither head was independently actionable,[5] and they could not be relied on to create a cause of action which would not otherwise exist.

In the instant case Lady Black said that what mattered was the behaviour of the IgE antibody, which was produced by an individual who had suffered platinum salt sensitisation. If such an individual was again exposed to platinum salts, the antibody was likely to react in a way which produced allergic symptoms. When individuals became sensitised, that change to their bodies meant that they lost their capacity to work around platinum salts. The physiological changes to the claimants' bodies were undoubtedly harmful, and, applying *Cartledge*, the absence of symptoms did not prevent a condition from amounting to personal injury. What had happened to the claimants was that their bodily capacity for work had been impaired, making them significantly worse off, and their sensitisation was, therefore, actionable injury in its own right. In *Rothwell*, by contrast, the pleural plaques would not lead to or contribute to any condition which would produce symptoms, even with further exposure to asbestos dust.

The decision that sensitisation was personal injury meant that their Lordships did not need to consider the claimants' alternative argument, that they could recover damages for economic loss under an

[3] [1963] AC 758.

[4] [2007] UKHL 39, [2008] 1 AC 281.

[5] *Gregg v Scott* [2005] UKHL 2, [2005] 2 AC 176 and *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65 (HL) respectively. The decision in *Rothwell* was reversed by legislation in Scotland: see the Damages (Asbestos-related Conditions) (Scotland) Act 2009, deeming asbestos-related pleural plaques to be personal injury which is not negligible.

implied contractual term and/or in negligence on their being redeployed or dismissed or on being caused to resign. On this question the Court of Appeal had held that the financial consequences for the employees of losing their jobs were governed by their ordinary rights under their contracts, and the principles of tort would not impose on the defendant employers a more extensive obligation. The decision illustrates that the courts are likely to deny a duty of care as between contracting parties where there is inconsistency between any such duty and the assumed contractual obligations of the parties.

Dryden has been described as a decision at the very limits of 'personal injury.[6] Certainly it is not obvious that platinum sensitisation should be treated as personal injury to someone whose work does not involve contact with platinum. In this case the impact of the sensitisation on that person's life could fairly be described as negligible. Perhaps an alternative line of argument for their Lordships could have been to focus on the costs *for these claimants* of preventing or averting physical harm.[7] This also would have allowed their Lordships to avoid getting entangled in the intricacies of the law governing the recovery in negligence of pure financial losses.

Determining the duty issue

Ever since Lord Atkin's seminal judgment in *Donoghue v Stevenson*[8] the courts have continued to debate an appropriate methodology for determining whether one person owes to another a duty to take care. For a time the *Anns* two-stage approach commanded widespread support, being regularly invoked by the courts throughout the common law world. Fairly soon, however, doubts began to surface, the House of Lords itself started having second thoughts, and in a series of decisions[9] culminating in *Caparo Industries plc v Dickman*[10] the two-stage test came to be abandoned. In *Caparo* Lord Bridge emphasised the inability of any single general principle to provide a practical test that could be applied to every situation to determine whether a duty of care was owed and, if so, what was its scope. His Lordship said that whether the courts would recognise a duty of care in any particular case depended on the foreseeability of the harm, the proximity of the relationship between the parties and, generally, considerations of fairness and reasonableness. These concepts of proximity and fairness were not susceptible of such precise definition as would be necessary to give them utility as practical tests, but amounted, in effect, to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognised pragmatically as giving rise to a duty of care of a given scope. The law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable stage two considerations.[11]

Lord Bridge certainly saw the *Anns* approach as too broad and expansionist, leading him to reaffirm the importance of the traditional categorisation of distinct and recognisable situations as guides to the existence, the scope, and the limits of the varied duties of care the law imposes. In 2018 five

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[6] J Morgan, "The Outer Limits of 'Personal Injury'" (2018) 77 CLJ 461.

[7] See generally D Nolan, 'Preventive Damages' (2016) 132 LQR 68.

[8] [1932] AC 562.

[9] See especially *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 (HL) [*The Aliakmon*]; *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 (PC); *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 (HL) at 1059; *Curran v Northern Ireland Co-ownership Housing Assoc Ltd* [1987] AC 718 (HL); *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53 (HL).

[10] [1990] 2 AC 605 (HL).

[11] Quoting the words of Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 481.

decisions in the Supreme Court - *Robinson v Chief Constable of West Yorkshire Police,*[12] *Darnley v Croydon Health Services NHS Trust*,[13] *NRAM Ltd v Steel*,[14] *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA*[15] and *James-Bowen v Commissioner of Police for the Metropolis*,[16] considered below in that order - have put the focus on the approach taken in *Caparo* or on other duty 'tests' and how they ought to be understood. In addition, a recent decision of the Supreme Court of Canada has considered the duty question in the context of a defendant's failure to prevent a third party from causing injury.[17]

Negligent conduct causing personal injury

In *Robinson v Chief Constable of West Yorkshire Police*[18] Lord Reed warned at some length against misconceiving the role that should be played by the *Caparo* inquiry. His Lordship said that the proposition that the test applied to all claims in the modern law of negligence, and that in consequence the court would only impose a duty of care where it considered it fair, just and reasonable to do so on the particular facts, was mistaken. Applying the approach adopted in *Caparo*, there were many situations in which it had been clearly established that a duty of care was or was not owed. Where the existence or non-existence of a duty of care had been established, a consideration of justice and reasonableness formed part of the basis on which the law had arrived at the relevant principles. It was therefore unnecessary and inappropriate to reconsider whether the existence of the duty was fair, just and reasonable (subject to the possibility that the court might be invited to depart from an established line of authority). Nor, a fortiori, could justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court might regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty.

Lord Reed affirmed that it was normally only in a novel type of case, where established principles did not provide an answer, that the courts needed to go beyond existing principles in order to decide whether a duty of care should be recognised. Following *Caparo,* the characteristic approach of the common law in such situations was to develop incrementally and by analogy with established authority. The drawing of an analogy depended on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also had to exercise judgment when deciding whether a duty of care should be recognised in a novel type of case. It was the exercise of judgment in those circumstances that involved consideration of what was 'fair, just and reasonable'. Accordingly, properly understood, *Caparo* achieved a balance between legal certainty and justice. In the ordinary run of cases, courts considered what had been decided previously and followed the precedents (unless it was necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arose had not previously been decided, the courts would consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They would also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable.

In *Robinson* itself the claimant was walking along a street when she was injured in a melee involving two police officers who were struggling to arrest a drug dealer. The Court of Appeal held that the police owed no duty to the claimant to take care, on the basis that they were not liable for their acts

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[12] [2018] UKSC 4, [2018] AC 736.

[13] [2018] UKSC 50, [2018] 3 WLR 1153.

[14] [2018] UKSC 13, [2018] 1 WLR 1190.

[15] [2018] UKSC 43, [2018] 1 WLR 4041.

[16] [2018] UKSC 40, [2018] 1 WLR 4021.

[17] *Rankin (Rankin's Garage & Sales) v JJ* 2018 SCC 19; *infra* n 63 and accompanying text.

[18] *Supra* n 12, at [21]-[29].

and omissions in the course of investigating and suppressing crime and apprehending offenders,[19] but that decision was emphatically reversed in the Supreme Court. Lord Reed said that there was no such rule and that the police generally owed a duty of care when such a duty arose under ordinary principles of the law of negligence, unless statute or the common law provided otherwise. In the particular case, the ground of action was liability for damage caused by carelessness on the part of the police officers in circumstances in which it was reasonably foreseeable that their carelessness would result in the claimant being injured. Her complaint was not that the police officers failed to protect her against the risk of being injured, but that their actions resulted in her being injured. In short, the case was concerned with a positive act, not an omission.

If the facts could be seen to point to the claimant's injury having been inflicted by the criminal rather than by the police officers, the claimant would need to establish that the police officers owed a duty to protect her and were in breach of that duty. Maybe a duty could be found depending on the circumstances, although at the time of the injury the criminal probably would need to be under the police officers' control,[20] and whether there was a breach also would very likely be in dispute. However, the police officers accepted that in making their planned arrest it was necessary to consider the risk to those in the vicinity, and the evidence showed that at the critical moment the claimant had just walked past the criminal and was within a yard of him and in full view, yet the arresting officer simply failed to notice her. It was simply a claim alleging personal injury caused by positive conduct, and such claims do not normally give rise to a contestable duty issue. Their Lordships' decision accordingly can be seen as an affirmation of ordinary principle.

Negligent statements causing personal injury

Darnley v Croydon Health Services NHS Trust[21] is a second decision of the Supreme Court where the claim was treated in a similar way. The claimant had been struck on the head by an unknown assailant and was driven by a friend to the accident and emergency department of the defendant's hospital. He told the receptionist that he was feeling very unwell and was worried that he needed urgent attention. The receptionist told him that he would have to wait up to four to five hours before somebody looked at him, but this was incorrect and she should have said that he could expect to be seen by a triage nurse within 30 minutes of arrival. The claimant felt too unwell to remain and wanted to go home to take some paracetamol, and he and his friend left without informing the receptionist or anyone else. After he got home the claimant became distressed, an ambulance was called and he was rushed back to hospital. A scan showed that he had suffered a large extra-dural haematoma and he underwent an operation for its evacuation, but he suffered permanent brain damage in the form of a severe and very disabling left hemiplegia.

Lord Lloyd-Jones emphasised that the court was not concerned with the imposition of a duty of care in a novel situation. The common law in the UK had abandoned the search for a general principle capable of providing a practical test applicable in every situation in order to determine whether a duty of care was owed and, if so, what was its scope. In the absence of such a universal touchstone, it had taken as a starting point established categories of specific situations where a duty of care was recognised and it had been willing to move beyond those situations on an incremental basis, accepting or rejecting a duty of care in novel situations by analogy with established categories. The familiar statement of principle by Lord Bridge in *Caparo*, referring to the ingredients of foreseeability of damage, proximity and fairness, did not require a re-evaluation of whether those criteria were

[19] *Robinson v Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15; and see *Davis v Commissioner of Police of the Metropolis* [2016] EWHC 348 (QB); *Rathband v Chief Constable of Northumbria* [2016] EWHC 181 (QB).

[20] Applying *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] 2 WLR 343.

[21] *Supra* n 13.

satisfied on every occasion on which an established category of duty was applied. In particular, as Lord Reed demonstrated in his judgment in *Robinson*, where the existence of a duty of care had previously been established, a consideration of justice and reasonableness had already been taken into account in arriving at the relevant principles and it was, normally, only in cases where the court was asked to go beyond the established categories of duty of care that it would be necessary to consider whether it would be fair, just and reasonable to impose such a duty. *Robinson* itself involved no more than the application of a well-established category of duty of care and all that was required was the application to particular circumstances of established principles.

Applying the law to the facts, Lord Lloyd-Jones said that the duty of the defendant had to be considered in the round. While it was not the function of reception staff to give wider advice or information in general to patients, it was the duty of the NHS Trust to take care not to provide misinformation to patients and that duty was not avoided by the misinformation having been provided by reception staff as opposed to medical staff. His Lordship was satisfied that the existence of a duty was clear and that the case was really about the question of negligent breach of duty.[22] Here the claimant was misinformed as to the true position and, as a result, misled as to the availability of medical assistance. The trial judge made the critical finding that it was reasonably foreseeable that a person who believed that it might be four or five hours before he would be seen by a doctor might decide to leave. In the light of that finding his Lordship had no doubt that the provision of such misleading information by a receptionist was negligent.

Actions in respect of negligent words are treated differently according to whether the words cause financial or physical damage. Negligent misstatements causing financial loss tend to give rise to a fear of indeterminate liability, and a consequent need to impose strict limits on the existence or ambit of any duty. But words are likely to be treated in the same way as positive conduct where reliance on the words leads to physical injury. A duty generally can be founded on the foreseeability of the injury and the proximity between the adviser and the advisee. Extra controls might exceptionally be needed in respect of advice disseminated to large numbers of physical victims, but the cases have tended not to raise difficulties of this kind. In any event *Darnley* raised no such issue and, accordingly, the duty question was straightforward. Other examples where liability was imposed in respect of physical injury include: an architect assuring a demolition contractor that a wall on the demolition site could safely be left standing;[23] a doctor negligently warning a patient about the risks of undergoing an operation;[24] and a local authority giving negligent advice to a mother concerning the suitability of a registered childminder.[25] Negligent advice leading to psychological or mental damage may likewise be actionable. So persons offering psychological or educational advice to members of the public were bound to exercise the skill and care reasonably to be expected of a reasonable psychologist or teacher.[26]

Reasonable reliance on negligent words

In financial loss cases where the question is whether the rule in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[27] applies, the question whether the claimant has reasonably relied on the defendant's words has assumed a fundamental significance. The point is illustrated in the decision of the Supreme

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[22] Citing J Goudkamp 'Breach of Duty: A Disappearing Element of the Action in Negligence?' [2017] CLJ 481.

[23] *Clay v AJ Crump & Sons Ltd* [1964] 1 QB 533 (CA).

[24] *Smith v Auckland Hospital Board* [1965] NZLR 191 (CA).

[25] *T v Surrey County Council* [1994] 4 All ER 577.

[26] *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL); *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 (HL).

[27] [1964] AC 465.

Court in *NRAM Ltd v Steel*,[28] but the analysis underlying the decision arguably creates unnecessary difficulty. A solicitor (S) sent an email to a client that misrepresented the nature of a transaction between the client and a finance company (NR), this in circumstances where the nature and terms of the transaction were fully known by NR. Lord Wilson accepted that a commercial lender about to implement an agreement with a borrower referable to its security did not act reasonably if it proceeded upon no more than a description of its terms put forward by or on behalf of the borrower. Here NR knew the terms of the agreement, and insofar as its officers who saw and acted on the email had never been aware of the terms or had forgotten them, immediate access to the correct terms lay - literally - at their finger-tips. No authority had been cited in which it had been held that there was an assumption of responsibility for a careless misrepresentation about a fact wholly within the knowledge of the representee. It was not reasonable for the representee to rely on the representation without checking its accuracy, and it was reasonable for the representor not to foresee that he would do so. The company's claim accordingly was dismissed.

Ordinary principle requires that a defendant should be able reasonably to foresee harm to the claimant, and it follows that it must be reasonable for the plaintiff to rely on what the defendant has said. So, as recognised by Lord Wilson, reasonable reliance causing foreseeable harm is a requirement in all cases. However, the suggested difficulty with his Lordship's judgment arises from its conflation of the need for reasonable reliance with the suggested test for imposing a duty of care in the circumstances of the case founded upon whether the defendant had assumed responsibility for her words. His reasoning in reaching this point thus needs to be examined.

Lord Wilson considered that the need for the representee reasonably to have relied on the representation and for the representor reasonably to have foreseen that he would do so lay at the heart of the decision in *Hedley Byrne*. In the light of the disclaimer, how could it have been reasonable for the appellant to rely on the representation? If it was not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it was difficult to imagine that the latter would have assumed responsibility for it. If it was not reasonable for a representee to have relied on a representation, it might often follow that it was not reasonable for the representor to have foreseen that he would do so. But the two inquiries remained distinct.

His Lordship recognised that in the decades which followed the decision in the *Hedley Byrne* case, it became clear that not all claims in tort for losses consequent upon representations carelessly made could satisfactorily be despatched by reference to whether the representor had assumed responsibility for it towards the representee. *Smith v Eric S Bush*[29] was an example, but Lord Griffiths, giving the leading judgment, explained the decision in 'arrestingly wide' terms. He said that the test of an assumption of responsibility was neither helpful nor realistic, and propounded instead a threefold test by reference to which the surveyors owed a duty of care to the claimants. The test required first that it was foreseeable that, were the information given negligently, the claimants would be likely to suffer damage; second that there was a sufficiently proximate relationship between the parties; and third that it was just and reasonable to impose the liability.

Months later came the *Caparo* decision, and his Lordship noted that for years afterwards the speeches in the House were taken to have endorsed the threefold test. However, Lord Bridge observed that the concepts of proximity and fairness were so imprecise as to deprive them of utility as practical tests, and Lord Oliver suggested that the three suggested ingredients of the so-called test were usually facets of the same thing and that to search for a single formula was to pursue a will-o'-the-wisp. That the House in *Caparo* did not indorse the threefold test was explained by Lord Toulson in *Michael v Chief*

[28] *Supra* n 14.

[29] [1990] 1 AC 831.

Constable of South Wales Police[30] and underlined by Lord Reed in *Robinson v Chief Constable of West Yorkshire Police*.[31] And more important for the purposes of the case at hand was the reassertion in *Caparo* of the need for a representee to establish that it was reasonable for him to have relied on the representation and that the representor should reasonably have foreseen that he would do so.[32]

Next, in *Spring v Guardian Assurance Plc*[33] the House held that, in writing a reference for the claimant who had worked for them and who was now seeking work elsewhere, the defendants owed him a duty of care. Lord Goff explained that the basis of his conclusion was that the defendants had assumed responsibility to the claimant in respect of the reference within the meaning of the *Hedley Byrne* case. Weeks later, in *Henderson v Merrett Syndicates Ltd*,[34] the House held that underwriting agents at Lloyd's owed a duty of care to a member in their conduct of his underwriting affairs even in the absence of any contract between them, and once again Lord Goff held that the case should be decided by reference to the concept of an assumption of responsibility. Again, in *Williams v Natural Life Health Foods Ltd*[35] Lord Steyn remarked that there was no better rationalisation for liability in tort for negligent misrepresentation than the concept of an assumption of responsibility.

Lord Wilson concluded that it had become clear that, although it might require cautious incremental development in order to fit cases to which it did not readily apply, this concept remained the foundation of the liability. So the legal consequences of the solicitor's careless misrepresentation were clearly governed by whether, in making it, she assumed responsibility for it towards NR. The concept fitted the present case perfectly and there was no need to consider whether there should be any incremental development of it. However, the case had an unusual dimension, in that the claim was brought by one party to an arm's length transaction against the solicitor who was acting for the other party. A solicitor owed a duty of care to the party for whom he is acting but generally owed no duty to the opposite party.[36] The absence of that duty ran parallel with the absence of any general duty of care on the part of one litigant towards his opponent.[37] And the relevant authorities[38] demonstrated that the solicitor would not assume responsibility towards the opposite party unless it was reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so.

Manifestly, then, Lord Wilson endorses an 'assumption of responsibility' as the governing test in *Hedley Byrne* and, indeed, some other cases involving negligently inflicted financial loss. However, his Lordship only reaches this conclusion by treating reasonable reliance and reasonable foreseeability of such reliance as the test for whether there is a duty of care and as constituting the requisite assumption of responsibility. But the question of reasonable reliance is not a duty concept save insofar as it bears upon the initial question of foreseeability of harm. Clearly there must always be reliance in fact, or a claim will fail for lack of proof that the words caused any harm.[39] Assuming reliance can be

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[30] *Supra* n 20 at [106].

[31] *Supra* n 18 and accompanying text.

[32] *Supra* n 10 per Lord Bridge at 620-621, Lord Oliver at 638.

[33] [1995] 2 AC 296.

[34] [1995] 2 AC 145.

[35] [1998] 1 WLR 830.

[36] *Ross v Caunters* [1980] Ch 297, 322.

[37] *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] AC 853.

[38] His Lordship cited *Allied Finance and Investments Ltd v Haddow and Co* [1983] NZLR 22; *Midland Bank Plc v Cameron, Thom, Peterkin and Duncans* 1988 SLT 611; *Al-Kandari v J R Brown and Co* [1988] QB 665; *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560; *Connell v Odlum* [1993] 2 NZLR 257; *Dean v Allin and Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249.

[39] See, for example, *Hunt v Optima (Cambridge) Ltd* [2014] EWCA Civ 714, [2015] 1 WLR 1346; *CGL Group Ltd v*

shown, a claim still cannot get off the ground without that reliance being reasonable and hence foreseeable. But this is not all, and the question remains whether a duty is owed to the particular person bringing the claim. As will be explained, this question is determined broadly by reference to pointers as to the closeness of the relationship between them and the purpose of the words concerned. Reliance may indeed be reasonable, yet no duty is owed. Take a *Caparo*-type case where a small investor sues a company auditor. Reliance on the audit may be entirely reasonable and sensible, and easily to be contemplated, yet for compelling reasons of policy no duty is owed. Again as will be explained, there may exceptionally be an actual acceptance by a defendant that he or she will take responsibility for his or her words, yet nearly always there is no such acceptance and the court decides whether to impose a duty in the circumstances of the case. The clear trend in many recent decisions, to be considered below, recognises this truth. Contrary to Lord Wilson's opinion, and in agreement with Lord Griffiths, to say there has been an assumption of responsibility represents a conclusion, not an argument.

It also seems timely to offer some continuing support to the maligned threefold approach to the duty issue that was taken in *Caparo*. It does not seem correct to say that *Michael* and *Robinson* rejected *Caparo* as a test. Rather, they clarified the importance of precedent and the cautious development of the law governing the duty question, and explained when the 'fair, just and reasonable' limb ought, somewhat exceptionally, to be invoked. That the three ingredients are imprecise and overlap does not mean that they are of no analytical value. To the contrary, they provide a helpful way of thinking about a duty problem.[40]

One further point about reliance on a negligent statement needs to be made. In a number of cases the courts have maintained that when a person has taken another's statement at face value and has acted on the faith of it, as it was intended that he should, the representor cannot be heard to say that the representee was in part the author of his own misfortune because he could with reasonable diligence have discovered the true position.[41] This might suggest that there can be no defence of contributory negligence, but seemingly there is no absolute rule and a finding of contributory negligence should, perhaps exceptionally, be possible even where reliance is reasonable.

Assuming responsibility for negligent words

A continuing source of uncertainty and debate is the relationship between the *Caparo* formula – which, when appropriately invoked or applied, appears to be of general application - and the proposition that a duty of care in the case of misstatements is founded upon the speaker's assumption of responsibility for what he or she says. Indeed, this test, or something like it, is found in all of the speeches in *Hedley Byrne*. Yet frequently it is not made at all clear what amounts to an assumption of responsibility and how it can be established.

The courts have recognised that it may sometimes be reasonable to infer an assumption of responsibility in the case of a voluntary provision of a service. In *Customs and Excise Commissioners v Barclays Bank Plc*[42] Lord Mance said that where there was fiduciary relationship, and where the defendant had voluntarily answered a question or tendered skilled advice or services in circumstances where he knew or ought to have known that an identified plaintiff would rely on his answers or advice, the special relationship was created by the defendant voluntarily assuming to act in the matter by

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Royal Bank of Scotland plc, *supra* n 47 at [99].

[40] See *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294.

[41] *Taberna Europe CDO II plc v Selskapet AF1* [2016] EWCA Civ 1262, [2017] QB 633 at [51]-[52].

[42] [2007] 1 AC 181 at [93]; and see at [35] per Lord Hoffmann.

involving himself in the plaintiff's affairs or by choosing to speak.[43] *Lejonvarn v Burgess*[44] is a recent instance. A friend and former neighbour of the claimants agreed, without any contract, to provide professional services as an architect on a landscaping project for the claimants' garden, and she did in fact provide the services and was relied on by the claimants properly to perform them, and in the circumstances the Court of Appeal held that she had assumed a responsibility and that she owed a duty of care to the claimants. She did not have to provide any services, but to the extent that she did she owed a duty to exercise skill and care in their provision.[45]

In cases of this kind and, indeed, in any *Hedley Byrne* case, the court usually *makes a determination* that the defendant assumed responsibility rather than finds that he or she did so in fact. Sometimes indeed such a determination is justified, in circumstances where a person has actually assumed responsibility for his or her words in more or less specific terms. Such an indication is likely to be rare, but if it has been given it will be reasonable to impose a duty. However, in most cases there is no actual assumption of responsibility, and the courts use the expression in cases where a person has chosen to speak in circumstances where the law imposes a duty to take care.[46] Used in this sense, of course, it does not tell us what those circumstances are.

In the *Barclays Bank* case there was general agreement that the notion of an assumption of responsibility was or could be of some help in a *Hedley Byrne* action, but that the concept could not be used as a general touchstone for liability in negligence for financial loss. Lord Bingham said it was clear that the test was to be applied objectively: it was not answered by consideration of what the defendant thought or intended. Yet he recognised that the further it was removed from the actions and intentions of the actual defendant, the more notional the assumption of responsibility became and the less difference there was from the approach taken in *Caparo Industries plc v Dickman*. In truth *Barclays Bank* tends to the view that the law deems a defendant to have assumed responsibility where there is a proximate or special relationship between the parties in circumstances where policy supports a duty. On this view the *Hedley Byrne* inquiry does not stand apart from other duty questions although, as Lord Mance noted, it may subsume the elements of the *Caparo* inquiry. This overlap was spelled out in *Lejonvarn v Burgess*,[47] where the Court of Appeal recognised that in a case involving the voluntary provision of a service (as in that case), there was no need to make a further inquiry into whether it would be fair, just and reasonable to impose liability, because such considerations would have been taken into account in determining whether there had been an assumption of responsibility. On this, seemingly correct, view the two identified approaches simply constitute different ways of arriving at the same conclusion. Again, in *CGL Group Ltd v Royal Bank of Scotland plc*[48] Beatson LJ, making a similar point in another way, observed that it was necessary carefully to analyse the various factors relevant to ascertaining whether a duty of care existed under all the tests, rather than focusing exclusively on 'assumption of responsibility'. And in *P & P Property Ltd v Owen White & Catlin llp* [49] the court recognised that an assumption of responsibility by a solicitor to a non-client would rarely be

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[43] See also *Henderson v Merrett Syndicates Ltd*, *supra* n 34.

[44] *Lejonvarn v Burgess* [2017] EWCA Civ 254, [2017] PNLR 25.

[45] In *Burgess v Lejonvarn* [2018] EWHC 3166 (TCC) it was determined that the defendant had not been in breach of duty as regards any of the work she had undertaken to do, and that the claim accordingly failed.

[46] See especially *Smith v Eric S Bush* [1990] 1 AC 831 (HL) at 862 per Lord Griffiths; *Caparo Industries plc v Dickman*, *supra* n 10 at 628 per Lord Roskill and 637 per Lord Oliver; *White v Jones* [1995] 2 AC 207 at 273–274 per Lord Browne-Wilkinson; *Phelps v Hillingdon London Borough Council* [2000] UKHL 47, [2001] 2 AC 619 (HL) at 654 per Lord Slynn.

[47] *Supra* n 44, at [64].

[48] [2017] EWCA Civ 1073, [2018] 1 WLR 2137, at [81].

[49] [2018] EWCA Civ 1082, [2018] 3 WLR 1244.

voluntary, and the professional would be treated as having assumed responsibility if the imposition of liability would be fair and reasonable.

Proximate relationship between adviser and advisee

It is apparent from all this that an imposed 'assumption of responsibility' serves as a label rather than as a test. Rather, the crucial question is whether a sufficiently close or 'special' relationship between defendant and plaintiff can be established so as to justify the imposition of a duty. In most cases there is no voluntary assumption of responsibility, but the law may deem the defendant to have assumed responsibility and find proximity accordingly if, when making the statement in question, the defendant foresaw or ought to have foreseen that the plaintiff would reasonably place reliance on what was said in the light of the purpose for which the statement was made and the purpose for which the claimant relied on it. This indeed is consistent with the analysis put forward by Lord Oliver in his frequently cited words in *Caparo* itself. His Lordship said:[50]

> What can be deduced from the *Hedley Byrne* case, therefore, is that the necessary relationship between the maker of a statement or giver of advice ('the adviser') and the recipient who acts in reliance upon it ('the advisee') may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and (4) it is so acted upon by the advisee to his detriment.

This kind of approach is well illustrated in two recent and leading decisions, one in Canada and one in the UK. In *Deloitte & Touche v Livent Inc*,[51] the Canadian case, a company auditor (D) failed to uncover a fraud by the directors of a company (L) in manipulating the company's records, but did identify irregularities in the reporting of profit from an asset sale. D did not resign but prepared documents in order for L to be able to solicit investment, and then proceeded to prepare L's 1997 audit. New equity investors later discovered the fraud, and a re-audit resulted in restated financial reports. The Supreme Court of Canada held that in these circumstances the continuing services provided by D to L were undertaken for the purpose of helping L to solicit investment, and that L was entitled to rely upon D taking reasonable care. A relationship of proximity arose, but only in respect of the content of D's undertaking. D did not alter the purpose for which it undertook to provide the 1997 audit or disclaim liability in relation to that purpose, so proximity was established in relation to the statutory audit on the basis of the already recognised proximate relationship. By negligently conducting the audit, and impairing L's shareholders' ability to verse management, D exposed L to reasonably foreseeable risks, including losses that would have been avoided with a proper audit.

The UK decision is *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA*.[52] The claimant (PCL) wanted a credit reference for a customer (B) who had applied for a cheque cashing facility in order to gamble at its casino. However, in order to preserve customer confidentiality, PCL's practice was not itself to ask its customer's bank for the reference. Instead, it arranged for an associated company (BSS) to do so without disclosing the purpose of the inquiry or the fact that the reference was required for the benefit of another company. The request was then sent to PCL's bankers, who forwarded it to the customer's bank (BNL) under cover of a letter stated to be on behalf of BSS and seeking BNL's opinion

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[50] *Supra* n 10 at 638.

[51] 2017 SCC 63, [2017] 2 SCR 795.

[52] *Supra* n 15.

on the character and standing of B. The reply, addressed to BSS, confirmed that B had an account with BNL and that he was trustworthy up to the specified amount. It added: 'This information is given in strict confidential' (sic). In reliance on the reference, PCL granted (and shortly afterwards increased) the cheque cashing facility. B thereafter played at the casino, drawing two cheques on BNL in return for gaming chips of the same amount, and made substantial winnings which PCL paid out to him. He then disappeared overseas and both cheques were returned unpaid. It was common ground that BNL had no reasonable basis for their reference. It held no account for B until two days after the reference was sent, when an account was opened in his name which always had a nil balance until it was eventually closed.

Lord Sumption, drawing upon Lord Oliver's judgment in *Caparo*, said that the defendant's knowledge of the transaction in respect of which a statement was made was potentially relevant for three purposes: (i) to identify some specific person or group of persons to whom he could be said to assume responsibility; (ii) to demonstrate that the claimant's reliance on the statement would be financially significant; and (iii) to limit the degree of responsibility which the defendant was taken to assume if no financial limit was expressly mentioned. Thus, in *Hedley Byrne* itself, the defendant understood that the statement would be relied on by the unidentified, but readily identifiable, client on whose behalf the bank was known to be making the inquiry. It was enough that the proposed transaction was said to be an advertising contract, and it would probably have been enough even if the transaction had only been identified as some kind of business transaction. In *Caparo* on the other hand, where the persons said to have been entitled to rely on the defendant's audit report were any potential bidder for the auditor's client, the absence of a specific transaction in the defendant's contemplation assumed decisive significance.

Counsel for the claimant accepted that in the ordinary course where a statement was relied upon by B to whom A had passed it on, the representor owed no duty to B unless he knew that the statement was likely to be communicated to B. Lord Sumption was satisfied that the concession was plainly justified, and thought further that, if the representor was to be taken to assume responsibility to B, it should also be part of the statement's known purpose that it should be communicated and relied upon by B. Counsel submitted to the contrary that PCL was BSS's undisclosed principal and that the relationship between BNL and PCL was 'equivalent to contract', because in contract PCL would have been entitled to declare itself and assume the benefit of the contract. However, his Lordship rejected the argument as fallacious. First, it did not follow from the fact that a non-contractual relationship between two parties was as proximate as a contractual relationship, that it was legally the same as a contractual relationship or involved all of the same legal incidents. Secondly, the relationship between a person dealing with another and the latter's undisclosed principal was not at all analogous to the kind of relationship which would give rise to a duty of care. The whole point about the law relating to undisclosed principals was that a person might be brought into contractual relations with someone with whom he had no factual relationship at all. Such a relationship was by definition not proximate. Nor was it in any relevant sense voluntary or consensual so as to give rise to an assumption of responsibility. It had none of the features which were held in *Caparo* to be necessary to bring the claimant into proximity with the defendant.

Lord Sumption concluded that, in the instant case, BNL had no reason to suppose that BSS was acting for someone else, and they knew nothing of PCL. In those circumstances, it was plain that they did not voluntarily assume any responsibility to PCL. It might well be, since they knew nothing of BSS either, that they were indifferent to whom they were dealing with. But the fact that a representor might have

been equally willing to assume a duty to someone else did not mean that he could be treated as if he had done so.[53]

Deloitte & Touche and *Playboy Club London* both illustrate the theme advanced in this article, that 'assuming a responsibility' in the *Hedley Byrne* context usually involves finding a close and proximate relationship between the parties in the sense explained by Lord Oliver in *Caparo.* Indeed, Lord Sumption in *Playboy* specifically spells this out. This undoubtedly is a helpful explanation of the cases, for it points us to key factors which determine whether a duty of care is likely to be recognised on the facts of any particular case. By contrast, posing the question in terms of whether the defendant has assumed responsibility towards the claimant is more likely to conceal them.

Financial loss in non-Hedley Byrne cases

In contrast to *Robinson* and *Darnley*, the decision of the Supreme Court in *James-Bowen v Commissioner of Police for the Metropolis*[54] concerned a question which was not covered by existing authority. Four police officers serving in the Metropolitan Police Service took part in the arrest of a suspected terrorist, BA, who made allegations that the officers had seriously assaulted and injured him during the arrest. The complaints were investigated by the Metropolitan Police Service's Directorate of Professional Standards and the Crown Prosecution Service, who concluded that there was no case to answer, and a charge brought against one respondent at the instigation of the Independent Police Complaints Commission was dismissed by the relevant disciplinary panel. BA subsequently issued civil proceedings alleging that the Commissioner was vicariously liable for the assaults he alleged had been committed by the officers. During the trial the Commissioner settled the claim on the basis of agreed damages and costs, together with an admission of liability and an apology for 'gratuitous violence' to which BA had been subjected by the officers. The officers were then charged with one count of an assault occasioning actual bodily harm arising out of the arrest of BA, and following a trial they were all acquitted. The officers thereupon sued the Commissioner for, inter alia, the damage done to their reputations and for economic loss stemming from the way the Commissioner had acted in the course of the litigation brought by BA and in settling the claim. Jay J struck out the claims and entered summary judgment for the Commissioner,[55] but the Court of Appeal allowed the appeal, holding that it was arguable that the Commissioner owed the alleged duty of care.[56] However, on further appeal, the Supreme Court held unanimously that no such duty was owed and that the claim should be dismissed.

Lord Lloyd-Jones said that the case was very clearly one in which it was sought to extend a duty of care to a new situation, and in determining whether such a duty should be recognised the law would proceed incrementally and by analogy with previous decisions. In addition, the proposed duty would be tested against considerations of legal policy, and judgment would have to be exercised with particular regard to both the achievement of justice in the particular case and the coherent development of the law. The instant claims were concerned with reputation, which the law protected via actions such as libel, slander, malicious falsehood and passing off. Moreover, a variety of other causes of action including breach of confidence, misuse of private information and causes of action in relation to data protection and intellectual property might often indirectly achieve this result. The

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[53] Other recent claims include *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] EWCA Civ 355, [2018] 1 WLR 3529 (bank negotiating and contracting with another party had not assumed a responsibility to disclose to that party the potential cost of breaking interest rate swap agreements with the bank); *P & P Property Ltd v Owen White & Catlin llp*, *supra* n 49 (no assumption of responsibility by defendant estate agents to claimant purchasers to verify the identity of the vendor of property).

[54] *Supra* n 16.

[55] *James-Bowen v Commissioner of Police for the Metropolis* [2015] EWHC 1249.

[56] *James-Bowen v Commissioner of Police for the Metropolis* [2016] EWCA Civ 1217.

common law did not usually recognise a duty of care in the tort of negligence to protect reputational interests, although there were exceptions. In *Spring Guardian Assurance plc*[57] the House of Lords recognised a duty owed by an employer to a former employee in writing him a reference, with three of their Lordships basing this on the three ingredients identified by Lord Bridge in *Caparo*. However, it might be that an assumption of responsibility by the author of the reference to the plaintiff, as favoured by Lord Goff, was the better rationalisation in these circumstances. Lord Lloyd-Jones thought that the decision should be contrasted with *Calveley v Chief Constable of the Merseyside Police*,[58] holding that a Chief Constable did not, in principle, owe a duty of care to protect the economic and reputational interests of his officers in respect of the prosecution of an investigation or disciplinary proceedings. *Calveley* had an important bearing on the instant case. If there was no duty in those circumstances, it was difficult to see why the Chief Constable should owe a duty to his officers as to the manner in which he defended a claim brought against him by a third party.

In light of these authorities, Lord Lloyd-Jones turned to test the proposed duty of care against relevant policy considerations and to consider the coherence of the resulting state of the law if such a duty was recognised. Critically, the interests of an employer who was sued on the basis that he was vicariously liable for the tortious conduct of his employees differed fundamentally from the interests of those employees. The employer had to be able to make his own investigation into the claim and to assess its strength. He needed to form his own view as to the reliability and veracity of his employee and how he was likely to perform as a witness, and to decide what degree of importance he attached to successfully defending the claim and what financial and other resources should be devoted to its defence. He might consider that, however strong the prospects of a successful defence, he could not justify the cost and effort of defending the claim and that it should, therefore, be settled. The predominant interest of the employee, by contrast, would be that his reputation should be vindicated. The position would often be complicated further by the existence of inconsistent views or interests between different employees or groups of employees. These stark differences strongly suggested that it would not be fair, just or reasonable to impose on an employer a duty of care to defend legal proceedings so as to protect the economic or reputational interests of his employee. A further dimension was that the Commissioner held a public office and had responsibility for the Metropolitan Police Service, and in the conduct of the proceedings against her she had to be free to act as she considered appropriate in accordance with her public duty.

Various policy considerations relating to the conduct of litigation also weighed heavily against any duty of care. First, an employer who wished to defend a claim based on vicarious liability for the alleged conduct of his employees should be entitled to defend the claim in the way he saw fit, without having constantly to look over his shoulder for fear that his conduct of the defence might expose him to a claim by his employees that the case should have been run differently. The proposed duty would inevitably have a chilling effect on the conduct of the defence. An employer would, understandably, be less likely to make admissions in circumstances where they were objectively justified or to make use of evidence which reflected unfavourably on an employee, for fear of the subsequent repercussions. Second, a duty to defend a claim effectively would be inconsistent with the important legal policy which encouraged the settlement of civil claims. The risk of exposure to consequential claims would operate as a powerful disincentive to settlement. Third, a duty could result in delay or disruption of civil proceedings. Disputes between employers and employees as to the appropriate way in which the defence should be conducted could well paralyse the defence. And fourth, recognition of a duty would be a fruitful source of satellite litigation. It would be likely to result in a proliferation of consequential claims which would often amount to a collateral challenge to the outcome of earlier proceedings.

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[57] *Supra* n 33.

[58] [1989] 1 AC 1228.

Finally, Lord Lloyd-Jones thought there was force in the Commissioner's submission concerning the implications of the proposed duty for legal professional privilege. The effective defence of proceedings by employees against the employer brought on the basis that the earlier proceedings were conducted in breach of duty might well require waiver of privilege in order to demonstrate the contrary. This had the potential to undermine the effective conduct of the defence of the original claim against the employer in that the possibility of such a claim in negligence and the likelihood of having to waive privilege might well inhibit frank discussion between the employer and his legal advisers. This was, therefore, a further consideration which weighed against the recognition of the duty of care for which the officers contended.

The decision perhaps is hard on the disappointed claimants, but that may often be the result in cases where a duty is denied for reasons of policy unconnected with whatever merits a claim may otherwise have. Certainly Lord Lloyd-Jones was able to point to various compelling policy concerns. In particular, a duty which may give rise to conflicting interests is likely to be denied, at least as in the instant case where the conflict might require the defendant to take into account the interests of the opposing party in his or her conduct of the claim. Solicitors similarly do not normally owe a duty of care to the other party to litigation involving their client, for the solicitor must act with undivided loyalty in the client's best interests.[59] Again, in *D v East Berkshire Community Health NHS Trust*[60] a majority of the House of Lords held that health care and childcare professionals investigating allegations of child abuse did not owe a duty of care to the parents of the children concerned. Lord Nicholls maintained that health professionals should not be subject to potentially conflicting duties when deciding whether a child may have been abused, or when deciding whether their doubts should be communicated to others, or when deciding what further investigatory or protective steps should be taken. In principle the appropriate level of protection for a parent suspected of abuse was that clinical or other investigations should be conducted in good faith. This afforded suspected parents a similar level of protection to that afforded generally to persons suspected of committing crimes.

Even so, as recognised in *James-Bowen*, the fact that the recognition of a duty of care may potentially subject an individual to conflicting duties is not, of itself, necessarily conclusive against its recognition in all situations, and it is necessary to have regard to the competing underlying policy considerations. As for these, the numerous ways in which the proposed duty in *James-Bowen* might have a negative impact on the conduct of adversarial litigation all pointed to the need to reject it.

Omissions by property owners

Smith v Littlewoods Organisation Ltd[61] is a leading case governing the liability of an owner of property for damage to a neighbour caused by the state of the property or something done on it. Lord Goff recognised two bases upon which a duty may be imposed. One was where a defendant had knowledge or means of knowledge that a third party had created or was creating a risk of danger on the premises and failed to prevent the danger from damaging neighbouring property. The other was where the defendant's negligence caused or permitted to be caused a source of danger and it was reasonably foreseeable that third parties might interfere with it and, sparking off the danger, cause damage to the plaintiff. These principles have been applied in a number of cases concerning failures to prevent danger caused by intruders on land from escaping and causing damage. In *Smith* itself the danger was a fire in a derelict cinema started by vandals, and a neighbour's claim for damage caused by the fire spreading was held to fail. The defendants had not known of any previous acts of vandalism involving

[59] *Supra* nn 36-38.

[60] [2005] UKHL 23, [2005] 2 AC 373.

[61] [1987] AC 241 (HL).

fire or a risk of fire, and nor could the empty cinema be described as an unusual danger in the nature of a fire hazard.

The question also has arisen whether the owner of a motor vehicle can be held responsible on similar principles for damage done by a person who interferes with or steals the vehicle. The decisions show that, normally, a motor vehicle cannot be regarded as posing a special danger such that the owner is obliged to take care to prevent someone else from using it. In *Topp v London Country Bus (South West) Ltd*[62] the defendant parked his minibus outside a pub and left it unlocked and with the key in the ignition. An unknown person stole it and later that day knocked down and killed the plaintiff's wife. The Court of Appeal held that even if the defendant was at fault he was not liable for the intervening act of another person who was a complete stranger to him.

In *Rankin (Rankin's Garage & Sales) v JJ*[63] a similar question came before the Supreme Court of Canada. Two minors (J and C) were at the house of C's mother drinking alcohol and taking drugs. Sometime after midnight they decided to walk around town, with the intention of stealing valuables from unlocked cars. Eventually they found an unlocked car with the keys in the ashtray parked on the property of a commercial garage (R). C did not have a driver's licence and had never driven on the road, but he decided to steal the car and told J to get in, which he did. C then drove the car out of the garage and on the highway where, shortly, afterwards, the car crashed, causing J to suffer catastrophic injury. Through his litigation guardian, J sued R, C and C's mother for negligence. At the trial it was held, inter alia, that R owed a duty of care to J, and this finding was upheld in the Ontario Court of Appeal. On a further appeal to the Supreme Court it was held in a majority judgment (McLachlin CJ and Abella, Moldaver, Karakatsanis, Wagner, Côté and Rowe JJ, Gascon and Brown JJ dissenting) that the appeal should be allowed and the claim against R dismissed.

Karakatsanis J said that the question was whether the type of harm suffered was reasonably foreseeable to someone in the position of R when considering the security of the vehicles stored at the garage. The evidence could establish, as the jury found, that R ought to have known of the risk of theft. However, physical injury was only foreseeable when there was something in the facts to suggest that there was not only a risk of theft, but a risk that the stolen vehicle might be operated in a dangerous manner. To find a duty of care, there needed to be some circumstance or evidence to suggest that a person in the position of R ought to have reasonably foreseen the risk of injury — that the stolen vehicle could be operated unsafely. In the circumstances of this case, the courts below relied upon the risk of theft by minors (who could well be inexperienced or reckless drivers) to connect the failure to secure the vehicles with the nature of the harm suffered, personal injury. The risk of theft in general did not automatically include the risk of theft by minors. Some evidentiary basis was required before a court could conclude that the risk of theft included the risk of theft by minors. Here, there was insufficient evidence to suggest that minors would frequent the premises at night, or be involved in joyriding or theft. Aside from evidence that could establish a risk of theft in general, there was nothing else to connect the risk of theft of the car to the risk of someone being physically injured. The evidence did not provide specific circumstances to make it reasonably foreseeable that the stolen car might be driven in a way that would cause personal injury.

His Honour concluded that J had not met the burden of establishing a *prima facie* duty of care owed by R. Reasonable foreseeability of personal injury could not be established. A business would only owe a duty to someone who was injured following the theft of a vehicle when, in addition to theft, the unsafe operation of the stolen vehicle was reasonably foreseeable.

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[62] [1993] 1 WLR 976 (CA).

[63] *Supra*, n 17.

Gascon and Brown JJ maintained, by contrast, that the case involved the application of a category of relationships that had long been recognised as imposing a duty of care — namely, where the defendant's act foreseeably caused physical harm to the plaintiff. Imposition of a duty of care was conditioned in the instant case only upon J showing that physical injury to him was reasonably foreseeable under any circumstances flowing from R's negligence. It was open to the trial judge to conclude that R's negligence in leaving unattended vehicles unlocked with keys inside overnight could have led to reasonably foreseeable physical injury. There was no palpable and overriding error in those findings and, therefore, they should not be interfered with.

The majority view in *Rankin* is broadly consistent with UK law. Perhaps a car in itself should be seen as a source of special danger, but that seems unrealistic in light of the prevalence of car ownership in the UK and elsewhere. Obviously it is entirely normal. Rather, there needs to be something more which indicates why in the circumstances a car poses a particular danger of some kind, or there is some reason why the owner comes under a duty to control the driver. Otherwise the normal rule that A is not liable for failing to prevent B from causing harm to C will apply.[64] The view taken by the minority, simply that physical injury to J was reasonably foreseeable on R leaving the car with the keys in it, is not enough. On the particular facts the only possible basis for a duty would seem to lie in the application of a principle analogous to that in *Smith*, which, as suggested, has to fail.

The position would be different if the claim was for *the loss of the car*. So a custodian of someone else's car who left the keys in the ignition could be liable to the owner for its theft, but in the instant case it was the negligent driving of the thief, not the taking of the car, that caused the damage.[65]

Vicarious liability

Independent contractors

The orthodox understanding of the doctrine of vicarious liability for long was that it depended for its application on the distinction between a contract creating an employer-employee relationship (sometimes termed a contract of service), and a contract which created the most significant alternative relationship arising from work for reward, that between a principal and an independent contractor (sometimes termed a contract for services). However, starting with the decision in Canada in *John Doe v Bennett*[66] and in England with the *Christian Brothers* case,[67] the doctrine has been significantly extended, by including within its ambit certain relationships that are analogous to employment. In the latter case Lord Phillips said that the objective was to ensure, insofar as it was fair, just and reasonable, that liability for tortious wrong was borne by a defendant with the means to compensate the victim. Such defendants could usually be expected to insure against the risk of such liability, so that this risk was more widely spread. It was for the court to identify the policy reasons why it was fair, just and reasonable to impose vicarious liability and to lay down the criteria that had to be shown to be satisfied. They were: (i) the employer was more likely to have the means to compensate the victim than the employee and could be expected to have insured against that liability; (ii) the tort would have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity was likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity would have created

[64] *Michael v Chief Constable of South Wales Police*, *supra* n 20 at [97].

[65] *Breslin v Corcoran* [2003] 2 IR 203 (IESC).

[66] 2004 SCC 17, [2004] 1 SCR 436.

[67] *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56, [2013] 2 AC 1; and see *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660; *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677; *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355.

the risk of the tort committed by the employee; (v) The employee would, to a greater or lesser degree, have been under the control of the employer.

The core of the doctrine of vicarious liability traditionally had involved commercial employers being held liable for negligence by their employees that was committed in the course of employment. These new developments have been driven by cases involving child abuse committed by priests or other persons in circumstances where the defendant being sued was not their employer. However, in none of the cases mentioned above was the court required directly to address the question whether, by imposing liability on this wider basis, there might now also be vicarious liability for the tort of an independent contractor. But in *Barclays Bank plc v Various Claimants*[68] that question squarely arose. In this case 126 claimants sought damages against Barclays Bank ('the Bank') in respect of alleged sexual assaults to which they were subjected by a doctor (B) to whom the Bank referred them for medical assessments prior to their employment. The Bank argued that B (who had died 8 years earlier) was an independent contractor, but the trial judge was satisfied that the *Christian Brothers* factors pointed towards the imposition of liability[69] and the Court of Appeal dismissed the Bank's appeal.

Irwin LJ observed that the law had been 'on the move' in recent time, and noted particularly that in *Cox* Lord Reed, drawing on *Christian Brothers*, focused on the relationship necessary between the tortfeasor and the defendant to found liability,[70] and that in *Mohamud* Lord Toulson explored how the conduct of the tortfeasor had to be related to that relationship.[71] Critically, Irwin LJ accepted that the law now required answers to the questions laid down in *Cox* and *Mohamud* and affirmed in *Armes*[72] rather than an answer to the question: was the alleged tortfeasor an independent contractor?

Applying the new approach to the facts, his Lordship said first that the judge was obviously right to conclude that the Bank had more means to satisfy the claims than had the (long distributed) estate of B. She was also correct to give this matter little weight. No liability could be founded on this consideration alone. On the second criterion - was the activity being taken on behalf of the Bank? - the answer was clearly 'yes', as the judge had concluded. While for most applicants it was right to say that the medical examination brought benefit to them, since it opened the door to employment, the principal benefit was to the prospective employer, for whom this step tended to ensure fit entrants able to give long service to the Bank. Thirdly, for the same reasons, the selection of suitable employees was also a part of the business activity of the Bank. As regards criterion four, the risk factor, the Bank specified the nature of the examinations as well as the time, place and examiner. The circumstances might less obviously give rise to the risk of tort than the long-term placement of children in a boarding school, in the care of supposedly celibate Brothers or priests, but the risk was, on these facts, perfectly properly established. Finally, the issue of the control exercised by the Bank over B was perhaps the most critical factor. The judge had concluded that the Bank was directional in identifying the questions to be asked and the examinations to be carried out, and exercised a higher level of control than might usually be found in the context of an examination required to be performed by a doctor, and she was correct in her findings and for the reasons she gave. She also was obviously correct that the medical examinations were sufficiently closely connected with the relationship between B and the Bank as to satisfy the second stage of the test for liability.

Irwin LJ concluded by observing that it was understandable that a 'bright line' test, such as was said to be the status of independent contractor, would make easier the conduct of business for parties and their insurers. However, ease of business could not displace or circumvent the recent principles

[68] [2018] EWCA Civ 1670.

[69] *Various Claimants v Barclays Bank plc* [2017] EWHC 1929.

[70] *Cox v Ministry of Justice*, *supra* n 67

[71] *Mohamud v WM Morrison Supermarkets plc*, *supra* n 67.

[72] *Armes v Nottinghamshire County Council*, *supra* n 67.

established by the Supreme Court. Further, establishing whether an individual was an employee or a self-employed independent contractor could be full of complexity and of evidential pitfalls. The *Cox/Mohamud* questions would often represent no more challenging a basis for analysing the facts in a given case.

Perhaps there is rather more doubt about whether the approach taken in recent Supreme Court decisions was intended to affect the employee/independent contractor distinction than Irwin LJ acknowledged. Those cases did not concern either employees or independent contractors, and arguably might be seen as not necessarily applicable in a case where the defendant has contracted with a person carrying on a recognisably independent business. In a recent decision in Singapore the Court of Appeal cautioned that the *Christian Brothers* criteria were not intended to effect a radical change in the law, but merely recognised that vicarious liability might be imposed outside the class of traditional employment relations.[73]

At all events *Kafagi v JBW Group Ltd*[74] is a decision going the other way. The respondent was a judicial services company which subcontracted the collection of certain council tax debts owed to the London Borough of Wandsworth to B, a certified bailiff. It was alleged that B and F, a companion, assaulted the appellant while seeking to collect such a debt and that the respondent was vicariously liable for their assault, but the Court of Appeal held that the claim should fail. Singh LJ noted that B ran his own business, that he could turn down work offered by the respondent, that he worked for other clients, and that he was at liberty to conduct the collection of a debt in whatever legal manner he saw fit, without control from the respondent. In particular he could share the work with another person, which was what he had done here. B also was obliged by the regulatory framework to provide a personal bond into court, which had nothing to do with the respondent, and he maintained his own indemnity insurance for his business. Finally there was not even the 'vestigial degree of control' to which Lord Reed made reference in *Cox*.[75] In all the circumstances it was not a case where the relationship between the respondent and the two bailiffs could be regarded as 'akin' to a relationship of employment. In so deciding Singh LJ affirmed that the conventional distinction between a contract of employment and a contract of services continued to be relevant in the vast majority of situations.

Close connection test

The second limb formerly used as the general test for determining whether an employer was vicariously liable for a wrongdoing employee - whether the employee had acted within the scope of, or during the course of, his or her employment or authority – came to be seen as inadequate in cases where the employee acted in accordance with his or her own interests or desires and in a way which was deliberately wrongful and sometimes criminal. Certainly the difficulty in satisfying the test was manifest in sexual abuse cases. Applying the so-called Salmond test,[76] in what sense could the sexual abuse of a pupil by a teacher be said to be an improper mode of performing authorised work? Accordingly it has been replaced, at least for some cases, by a different test, namely, whether the conduct was 'closely connected' with the employment (or relationship analogous to employment). In *Bazley v Curry*,[77] in a highly influential judgment in the Supreme Court of Canada, McLachlin CJ identified the fundamental question as being whether the wrongful act was sufficiently related to

[73] *Ng Huat Seng v Munib Mohammad Madni* [2017] SGCA 58 at [63]-[64].

[74] [2018] EWCA Civ 1157.

[75] *Supra* n 67 at [21].

[76] JW Salmond *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, London, 1907) at 83–84.

[77] [1999] 2 SCR 534 at 559–560.

conduct authorised by the employer to justify the imposition of vicarious liability. So vicarious liability was generally appropriate where there was a significant connection between the creation or enhancement of a risk and the wrong that accrued therefrom, even if unrelated to the employer's desires. In the UK, in the *Christian Brothers* case, Lord Phillips endorsed the Canadian approach. His Lordship said that vicarious liability was imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, had done so in a manner which had created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involved a strong causative link.

The above cases were both claims involving child abuse. But a test asking whether there is a close connection between a person's wrongdoing and his or her relationship with another where that relationship creates a special risk of harm to the victim has been applied in other cases of deliberate wrongdoing. In *Mohamud v WM Morrison Supermarkets plc*[78] the Supreme Court recognised that the close connection test could apply broadly in cases where the question of the link between the relationship and the wrongdoing was in issue. Lord Toulson said that the court had to consider two matters. The first question, to be addressed broadly, was what functions or 'field of activities' had been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. Secondly, the court had to decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable as a matter of social justice. The cases in which the necessary connection had been found were cases in which the employee used or misused the position entrusted to him in a way which injured the third party.

Two recent decisions of the Court of Appeal have both imposed liability in circumstances falling close to the line. In *Bellman v Northampton Recruitment Ltd*,[79] the managing director (M) of the defendant employer violently assaulted the plaintiff employee (B) at a voluntary gathering for late night drinking in a hotel immediately following the workplace Christmas party. The assault came after B had challenged M about another employee's appointment at one of the work branches. Asplin LJ, giving the leading judgment, allowed the plaintiff's appeal and held that there was a sufficiently close connection between the assault and M's employment as managing director. Applying *Mohamud*, her Ladyship was satisfied that M had responsibility for all management decisions, that his remit and his authority were very wide and that at the time of the assault he was purporting to exercise authority over his subordinate employees. While the unscheduled drinking session was not a seamless extension of the Christmas party, M organised and paid for taxis to and drinks at the hotel and work discussions continued there. Even if he had taken off his managerial hat when he arrived at the hotel, he chose to don it once more and misuse his position when his managerial decisions were challenged by B. There was no suggestion that M's behaviour had arisen as a result of something personal. Irwin LJ agreed, saying that what was crucial was that the discussions about work became an exercise in M vehemently and crudely laying down the law with the intention of quelling dissent. That exercise of authority was something he was entitled to carry out, and it did arise from the field of activity assigned to him. But the facts were unusual, and the case emphatically was not authority for the proposition that employers became insurers for violent or other tortious acts by their employees.

Suppose now that an employee deliberately harms a third party in order to strike at his or her employer. In *WM Morrisons Supermarket PLC v Various Claimants*[80] the defendant employer was held vicariously liable for the criminal actions of a rogue employee, a senior IT auditor, in disclosing

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[78] *Supra*, n 67.

[79] [2018] EWCA Civ 2214.

[80] [2018] EWCA Civ 2339.

personal information about the claimant co-employees on the web when motivated by a work-related grudge. The Court of Appeal considered that there was nothing unusual or novel in legal terms about the case, and rejected the argument that imposing vicarious liability might seem to render the court an accessory in fostering the employee's criminal aims. It was held in *Mohamud* that the motive of the wrongdoer (personal racism in that case) was irrelevant, and the court did not accept that there was an exception where the motive was, by causing harm to a third party, to cause financial or reputational damage to the employer. Nor was the court persuaded that a finding of vicarious liability would place an enormous burden on the defendants and other innocent employers in future cases. Major data breaches might, depending on the facts, lead to a large number of claims for potentially ruinous amounts, but the solution was to insure against such catastrophes; and employers could likewise insure against losses caused by dishonest or malicious employees. The fact of a defendant being insured was not a reason for imposing liability, but the availability of insurance was a valid answer to the Doomsday or Armageddon arguments put forward by counsel on behalf of Morrisons.

The plea of ex turpi causa

Inconsistency with the criminal law

The circumstances in which a defendant may be able to rely on the defence that the claimant was engaged in illegal conduct at the time he or she suffered injury or damage is a controversial topic. Once again an influential judgment comes from the Supreme Court of Canada. In *Hall v Hebert*[81] McLachlin J maintained that the plea of ex turpi causa would bar recovery only where to allow it would undermine the integrity of the legal system, by introducing inconsistency into the law's fabric. Thus a plaintiff would not be permitted to profit from his or her illegal conduct, as where a plaintiff claimed for financial loss arising from a joint illegal venture, or for exemplary damages; nor to evade a penalty prescribed by the criminal law, as where a burglar was caught due to his partner's negligence and required to pay a fine. Accordingly, a wrongdoer could still recover damages insofar as this was not compensation for an illegal act but was compensation for the loss caused by the negligence of another.

The distinction is clearly illustrated in the recent and already discussed decision of the Court in the *Rankin* case.[82] As we have seen, the plaintiff was very seriously injured in an accident when he was a passenger in a car, being dangerously driven by a friend, which they had stolen from the defendant. Karakatsanis J observed in the course of his judgment that if the mere fact of illegal behaviour could eliminate a duty of care, this would effectively immunise negligent defendants from the consequences of their actions. The concern in *Hall* did not arise, and plaintiff wrongdoing was integrated into the analysis through contributory negligence.

Gray v Thames Trains Ltd[83] is a decision of the House of Lords where the defence applied. The plaintiff suffered major psychological harm and post-traumatic stress disorder after being involved in a train accident caused by the defendant's negligence. He later stabbed a stranger to death, and was ordered to be detained in a mental hospital after pleading guilty to manslaughter on the grounds of diminished responsibility. The defendants argued that they were not liable for loss of earnings after the date of the killing, on the basis that the claim was barred by the ex turpi causa rule. The argument was rejected in the Court of Appeal,[84] but the decision was reversed on appeal to the House of Lords. Lord Hoffmann referred to a special rule of public policy saying, in its wider form, that you cannot recover for loss which you have suffered in consequence of your own criminal act, and in its narrower form, that you cannot recover for damage which flows from loss of liberty, fine or other punishment lawfully imposed

[81] [1993] 2 SCR 159.

[82] *Supra*, n 63 at [62]-[64].

[83] [2009] UKHL 33, [2009] 1 AC 1339; and see *Clunis v Camden and Islington Health Authority* [1998] QB 978 (CA).

[84] *Gray v Thames Trains Ltd* [2008] EWCA Civ 713, [2009] 1 AC 1339.

on you in consequence of your own unlawful act. Here, applying the narrower rule, it was the law which as a matter of penal policy caused the damage, and it would be inconsistent for the law to require a person to be compensated for that damage.

The objection to the view of the Court of Appeal is that tort comes to play the criminal law's conscience.[85] The criminal conviction is premised on the offender's free will, and awarding damages in respect of its consequences jeopardises the relationship between the criminal and the civil law by subverting the objects of the criminal law.[86] But if a claimant is found not guilty by reason of insanity the position is different. So there was no bar to a claim against a mental health authority by a mental patient who had killed his father after his release but who was not guilty of murder by reason of insanity.[87]

Assuming the claimant is guilty, is the *degree* of the claimant's personal responsibility relevant? The House of Lords in *Gray* did not speak with one voice on the question. Lord Hoffmann clearly thought not, saying that it had to be assumed that the sentence was what the criminal court regarded as appropriate to reflect the personal responsibility of the accused for the crime he had committed. Lord Scott and Lord Rodger seemed to be of similar view. But Lord Phillips left open the situation where the criminal act of the defendant demonstrated the need to detain him both for his own treatment and for the protection of the public, but the trial judge made it clear that he did not consider that the defendant should bear significant personal responsibility for his crime.

Impact of Patel v Mirza

This difference in view was considered in *Henderson v Dorset Healthcare University NHS Trust*.[88] The claimant, who had a history of paranoid schizophrenia, was discharged from her detention in hospital and subsequently stabbed her mother to death. She later pleaded guilty to manslaughter on the ground of diminished responsibility and was ordered to be detained in a secure hospital. In dismissing her claim for damages against the hospital, Jay J at first instance[89] recognised that her personal responsibility for the offence was low and less than significant but that gradations of personal responsibility were irrelevant. The law followed a unitary or monist approach to the substantial impairment issue, and the damages claim was precluded on the ground of the illegality inherent in the claimant's conviction. The Court of Appeal affirmed Jay J's decision, and in so holding made it clear that the law would continue to take this approach notwithstanding the decision of the Supreme Court in *Patel v Mirza*.[90] Counsel for the claimant argued that the mechanistic application of the *Gray* rule-based approach led to injustice in cases such as the instant appeal, and that it would be disproportionate to deny a claimant compensation in a situation where her responsibility was less than significant whereas the tortfeasor's was so much greater. The Court of Appeal recognised that *Patel* was a decision based on an illegal contract and a claim alleging unjust enrichment, but also that the decision was expressed generally in relation to the common law of illegality and that it was impossible to discern in the majority judgments any suggestion that *Gray* or *Clunis* were wrongly

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[85] See E Banakas, 'Tort Damages and the Decline of Fault Liability: Plato Overruled but Full Marks to Aristotle' (1985) 44 CLJ 195 at 197.

[86] J Goudkamp, 'Can Tort Law be Used to Deflect the Impact of Criminal Sanctions? The Role of the Illegality Defence' (2006) 14 TLJ 21 at 46.

[87] *Ellis v Counties Manukau District Health Board* [2007] 1 NZLR 196. The claim failed for other reasons.

[88] [2018] EWCA Civ 1841, [2018] 3 WLR 1651.

[89] *Henderson v Dorset Healthcare University NHS Trust* [2016] EWHC 3275, [2017] 1 WLR 2673.

[90] [2016] UKSC 42, [2017] AC 467.

decided or to discern that they could not stand with the reasoning in *Patel*. So they remained binding and had to be applied.

Let us consider what *Patel* decides. Lord Toulson's 'range of factors' approach brings into account (a) the underlying purpose of the prohibition which had been transgressed, (b) any other relevant public policies which might be rendered ineffective or less effective by denial of the claim, and (c) the possibility of overkill unless the law was applied with a due sense of proportionality. Potentially relevant factors in determining the question of proportionality included the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability. His Lordship thought that it was right for a court which was considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed.[91]

Lord Toulson's majority view appears to abolish *ex turpi causa* as a rule of law, and sees considerations relating to the claimant's illegal behaviour simply as a factor in the exercise of the court's discretion in determining whether to allow the claim. Yet in accepting the continuing authority of *Clunis* and *Gray* the majority decision seems to treat the inconsistency argument as a continuing and absolute rule, and leaves the potential impact of *Patel* in tort cases generally somewhat up in the air. This points to a significant uncertainty as to whether or the extent to which previously existing authority on the ambit of the ex turpi causa rule continues to bind a court when the plea is put in issue.

A rule that the courts will not assist claimants asserting certain base causes surely deserves to be supported, notwithstanding difficulty in defining the circumstances of its application. Suppose, further, that the inconsistency argument does not apply. Take the example of the hitman who fails to murder the proposed victim, whereupon the hirer demands his money back. Such a claim could be based upon restitutionary principles, as in *Patel*, and indeed Lord Neuberger, somewhat remarkably, thought that if a claimant paid a sum to the defendant to commit a crime, such as a murder or a robbery, the claimant should normally be able to recover the sum, irrespective of whether the defendant had committed, or even attempted to commit, the crime.[92] This view is very hard to accept: how could a court conceivably lend its aid to enforce such a claim? The turpitude of the plaintiff's conduct must necessarily bar any relief. The objection that the law comes to be founded on ad hoc value judgments is not insoluble. It should be possible for the courts to develop a reasonably consistent approach to the question. Indeed, a key part of the *Patel* inquiry focuses on the *seriousness* of the plaintiff's criminality or wrongdoing. Furthermore, the exceptions identified by Lord Sumption, where the plaintiff's illegal conduct is treated as involuntary or the plaintiff is the victim of exploitation, explain many of the cases.

The better view is that the *ex turpi causa* principle should be retained as representing an expression of policy, and that that policy is not based upon a single justification but on a group of reasons which vary in different situations.[93] That at least would avoid the difficulties in it being downgraded to a relevant factor in the exercise of a judicial discretion, albeit that the courts are likely to be able to

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[91] For explanation and discussion of the potential impact of *Patel*, see S Green and A Bogg (eds) *Illegality after Patel v Mirza* Hart Publishing, Oxford, 2018.

[92] *Supra* n 90, at [176]. See also the view of Lord Sumption at [254], although his Lordship pointed out that both parties would be subject to compensation orders made pursuant to statute.

[93] *Gray v Thames Trains Ltd*, *supra* n 83 at [30] per Lord Hoffmann.

reach the same result on either view. Two key questions will continue to underlie a court's determination of the issue. First, is the civil claim inconsistent with the criminal law in such a way that allowing the claim would undermine the integrity of the legal system, as explained by McLachlin J in *Hall v Hebert*? Second, even if not inconsistent, is the turpitude involved in the plaintiff's conduct such that the grant of relief by a court would be contrary to the public interest in the sense explained by Lord Sumption in the *Apotex* case[94] and as developed by his Lordship in *Patel*?

[94] *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430.